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Public Prosecutor v Mohd Jon

HIGH COURT (KUCHING) — CRIMINAL TRIAL NO KG 1 OF 1986
RICHARD MALANJUM JC
30 NOVEMBER 1992

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Criminal Procedure *— Trial — Defence to be heard before another judge — Whether judge would be at the disadvantage of not having the means to assess demeanour of witnesses so far called — Trial de novo in the interest of justice*

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The accused was charged under the Dangerous Drugs Act 1952 and the former trial judge, who has since retired, ruled that there was no case for the accused to answer at the close of the prosecution's case. On the prosecution's appeal, the Supreme Court ordered that the defence be called. The prosecution contends that the succeeding judge should continue from the defence stage. The defence, however, objected to the continuation of the hearing from the defence stage because:

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(a) the order of the Supreme Court was not clear and there was no formal order in writing issued; and

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(b) the present trial judge would be very much at the disadvantage of not having the means to assess the demeanour of the witnesses so far called.

Held, issuing an order for trial de novo:

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(1) Although no formal order of the Supreme Court was made available and the defence was unable to give the exact terms of the order, there is no dispute that the appeal against acquittal was allowed. In the interest of justice, the proper course is to consider that there was no order made that the defence is to be called before another judge.

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(2) Even though s 261 of the Criminal Procedure Code (FMS Cap 6) provides for the succeeding magistrate to act on the evidence recorded by the predecessor, there is no statutory provision applicable to the High Court.

(3) Although the succeeding judge would be disadvantaged in not having been able to assess the demeanour of the witnesses, he can always recall them. A succeeding court should be able to observe the demeanour in the usual course of giving evidence and not merely to observe and question the witnesses if they were telling the truth when they gave their previous evidence. The avoidance of delay and expenses in recalling the witnesses would be outweighed by the risk of prejudice or failure of justice in this case. Further, the primary consideration would be to ensure that the evidence recorded could be properly evaluated including the credibility of the witnesses who had testified.

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[Bahasa Malaysia summary

Si tertuduh dituduh di bawah Akta Dadah Berbahaya 1952 dan bekas hakim perbicaraan, yang telah bersara, memutuskan bahawa tidak terdapat kes untuk dijawab oleh si tertuduh apabila kes pihak pendakwa ditutup. Atas rayuan pihak pendakwa, Mahkamah Agong telah memerintah supaya pembelaan dipanggil. Pihak pendakwa berhujah bahawa hakim yang berikutnya patut meneruskan pembicaraan dari peringkat pembelaan. Pihak pembela pula membantah penerusan pembicaraan dari peringkat pembelaan kerana:

(a) perintah Mahkamah Agong tidak jelas dan tidak terdapat perintah formal bertulis dikeluarkan; dan
(b) hakim perbicaraan akan berada dalam keadaan yang tidak menguntungkan kerana tidak dapat menilai perilaku saksi yang telah dipanggil.

Diputuskan, mengarahkan perbicaraan de novo:

(1) Walaupun tidak terdapat perintah formal yang dikeluarkan oleh Mahkamah Agong dan pihak pembela tidak dapat memberi kata-kata tepat perintah itu, tidak dipertikaikan bahawa rayuan terhadap pembebasan telah dibenarkan. Demi kepentingan keadilan, arah yang betul adalah untuk menganggap bahawa tidak terdapat perintah supaya pembelaan dipanggil dihadapan hakim yang lain.
(2) Walaupun s 261 Kanun Acara Jenayah (FMS Cap 6) membenarkan majistret yang berikutnya bertindak atas keterangan yang direkodkan oleh majistret sebelumnya, tidak terdapat peruntukan statutori yang dapat dikaitkan kepada Mahkamah Tinggi.
(3) Walaupun hakim yang berikutnya berada dalam keadaan yang tidak menguntungkan kerana tidak dapat menilai perilaku saksi, beliau boleh memanggil mereka semula. Mahkamah yang berikutnya sepatutnya meneliti perilaku apabila keterangan diberi dan bukan setakat memperhatikan dan menyoal saksi samada mereka bercakap benar apabila mereka memberi keterangan yang terdahulu. Risiko kemudaratan atau ketidakadilan di dalam kes ini adalah jauh lebih penting daripada pengelakan kelewatan dan belanja apabila saksi dipanggil semula. Lebih-lebih lagi, pertimbangan utama adalah untuk memastikan bahawa keterangan yang direkodkan boleh dinilai dengan betul termasuk kebolehpercayaan saksi yang telah memberi keterangan.]

[*Editorial Note*: The Public Prosecutor has appealed to the Supreme Court vide Civil Appeal No 05–241–92.]

Cases referred to

1 *Chong Kwee Hian v PP* [1948] MLJ (folld)
2 *Haw Tua Tau v PP* [1981] 2 MJ 49 (refd)
3 *Munusamy v PP* [1987] 1 MLJ 492 (refd)
4 *Teay Wah Cheong v PP* [1964] MLJ 21 (refd)

A 5 *Oh Keng Seng v PP* [1976] 1 MLJ 143 (refd)
6 *Mohd Idris bin Haji Mohamed Said v Rex* [1949] MLJ 31 (refd)
7 *PP v Kulasingam* [1974] 2 MLJ 26 (refd)

Legislation referred to
B Criminal Procedure Code (FMS Cap 6) s 261

Mohd Zaki bin Yassin (Senior Federal Counsel/Deputy Public Prosecutor) for the prosecution.
Idris Buang (*Idris Buang Ibrahim Baki & Co*) for the accused.

C **Richard Malanjum JC**: This is a part-heard case. It was originally heard by his Lordship Tan Chiaw Thong J who has since retired. On a charge under s 39(B)(1)(a) of the Dangerous Drugs Act 1952 (Rev 1983), the learned former trial judge ruled that there was no case for the accused to answer at the close of the prosecution case. Accordingly, the accused was D acquitted and discharged on 2 March 1990.

The prosecution appealed against the order of the learned former trial judge. On 10 December 1990, the Supreme Court ordered for the defence to be called.

Before me, the learned deputy public prosecutor submitted that the E hearing of this case should continue from the defence stage, in line with the order made by the Supreme Court. The learned deputy also submitted that the appeal against the order of the learned former trial judge and the order of the Supreme Court are part and parcel of a trial.

Learned defence counsel objected to my continuation of the hearing of this case from the defence stage. His reasons are as follows:

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(1) the order of the Supreme Court was not clear as it was not audible when it was delivered and there was no formal order in writing issued; and
(2) that I will be very much at the disadvantage of not having the means to assess the demeanour of the witnesses so far called.

G In reply to my query, the learned deputy said that except for the recorder of the cautioned statement of the accused who has since died and the military witnesses who may have retired, there is no problem in recalling the witnesses. At the close of the prosecution case, ten witnesses were called excluding those called for the trial on the voire dire. The learned deputy H also submitted that he could not find any provision in the Criminal Procedure Code (FMS Cap 6) ('the Code') or in the Courts of Judicature Act 1964 which applies to the High Court in the same way as s 261 of the Code applies to the subordinate courts. The learned deputy was frank in his approach when he submitted that he was only concerned with the delay and I the expenses if the present case is to be heard afresh.

In considering the main question of whether or not I should continue to hear this case from the defence stage, the following issues require consideration, namely:

(a) whether it is the order of the Supreme Court that the defence is to be called before another judge; A
(b) the existence of any statutory provision;
(c) whether a just and fair assessment of the evidence so far recorded can be made without having to recall the witnesses; and
(d) if all or some of the material witnesses are recalled, whether such exercise would avoid the delay and the expenses and at the same time avoid any failure of justice. This is crucial bearing in mind that the charge preferred is a very serious one resulting in mandatory death penalty on conviction. B

Whether it is the order of the Supreme Court that the defence is to be called before another judge C

In considering this issue, I note that there is no formal order of the Supreme Court made available to me by either the learned deputy or the learned counsel for the accused. Indeed before me, it was only the learned counsel for the accused who was involved at the hearing before the Supreme Court. D Yet he now says that he could not hear the order properly when it was delivered and that no formal order in writing was issued. However, I find no reason as to why a request for a repeat of the order could not be made at that time. Nevertheless, learned counsel for the accused before me did not dispute that the appeal against the order of acquittal was allowed by the Supreme Court. In such a case and in the interest of justice and with all due E respect to their Lordships, I am of the view that the proper course to take is to consider that there was no order made that the defence is to be called before another judge. This is compatible with the notion that 'it is always very highly desirable that judgment should be given in any case by a "presiding bench" who has heard and recorded all the evidence himself and F has seen and heard all the witnesses'. (See: *Chong Kwee Hian v PP*)[1]

The existence of any statutory provision

Both learned deputy and learned counsel for the accused indicated to me that they found no statutory provision applicable to the High Court which G is similar in nature to s 261 of the Code. I think they are correct. In fact even the Indian Code of Criminal Procedure 1973 was only amended in 1978 to insert the word 'judge' in its s 326 which is the equivalent of our s 261. (See: *Sarkar on Criminal Procedure* (5th Ed)). I find therefore, no assistance from any statutory laws in this country to determine the main question before me. H

Whether a just and fair assessment of the evidence so far recorded can be made without having to recall the witnesses

In the case of *Haw Tua Tau v PP*,[2] Lord Diplock at p 51 has this to say: I

> ... Whoever has the function of deciding facts on the trial of a criminal offence should keep an open mind about the veracity and accuracy of recollection of any individual witness, whether called for the prosecution or the defence, until after

A all the evidence to be tendered in the case on behalf of either side has been heard and it is possible to assess to what extent (if any) that witness's evidence has been confirmed, explained or contradicted by the evidence of other witnesses.

And in *Munusamy v PP*[3] his Lordship Mohamed Azmi SCJ said thus at p 498:

B In the present appeal, the learned trial judge did not therefore err in dealing with the credibility of the witnesses at the close of the prosecution case. In our opinion, if he had dealt with the accuracy of the testimony, he merely erred in favour of the appellant in placing too high a burden on the prosecution before calling for the defence. Further, the fact that the learned trial judge had considered extensively in his judgment the evidence adduced by the defence, shows C that he did actually keep an open mind on questions of fact as to the actual guilt of the appellant until the close of the defence case.

It was submitted by the learned counsel for the accused that I would be very much at the disadvantage of not having the means to assess the demeanour of the witnesses so far called. I agree, but the short answer to this is that the D witnesses can be recalled.

In the event that all or some of the material witnesses are recalled, would such exercise avoid the delay and the expenses and at the same time avoid any failure of justice?

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The learned deputy is mainly concerned with the delay and the expenses if a fresh trial is ordered. I have perused the notes of the evidence and in my view, there are at least six material witnesses (that is the first six witnesses) whose veracity should be given material consideration before coming to any conclusion on the issues of fact in the instant case. Further, in recalling F these witnesses, I do not think that the exercise should be merely to observe their appearances or to question them if they were telling the truth when they gave their previous evidence. The exercise should be more than that. It should be done so as to enable the succeeding court to observe their demeanour in the usual course of giving evidence. As such, in my view, the G avoidance of delay and expenses would be outweighed by the risk of prejudice or failure of justice that might occasion to the accused in the instant case.

Further, I find that in the several reported cases which dealt with s 261 of the Code, the primary consideration was to ensure that the evidence recorded should be properly evaluated including the credibility of the H witnesses who had testified. I find no reason to disregard the common principle enunciated in those cases in considering the present case.

In the case of *Teay Wah Cheong v PP*,[4] Hashim J said at p 22:

Unless it would cause hardship and great inconvenience to the accused person and witnesses I think it is much better for a president or a magistrate to hear the I case ab initio rather than take over the recording of evidence from the other president or magistrate. For one thing the succeeding president or magistrate cannot assess the value of the evidence recorded by his predecessor via-a-vis the credibility of the witness.

And Ajaib Singh J (as he then was) in the case of *Oh Keng Seng v PP*[5] at p 144 observed thus: A

> The provision in s 261 of the Criminal Procedure Code which empowers the succeeding magistrate or president to act on the evidence recorded by his predecessor is no doubt intended to save time and money and to expedite the disposal of part-heard criminal cases. This provision however should be exercised with caution. It must be appreciated that the succeeding magistrate or president who acts on the evidence of witnesses whom he has not heard and seen is obviously at some disadvantage particularly in respect of the demeanour and credibility of those witnesses. There is therefore a real risk that evidence not wholly recorded by a magistrate or president but which is acted on by him may materially prejudice an accused person where a decision involving the credibility of a witness is based on that evidence. The provision however may generally be exercised where the evidence to be acted on is more or less formal or is largely uncontroversial and where the credibility of any material witness is not involved.

In the case of *Mohd Idris bin Haji Mohamed Said v Rex*,[6] Murray-Aynsley CJ said on the same page:

> The power given under the section is of value, particularly when it is used for evidence of a more or less formal character, or where the witness cannot be produced. In the present case the witness whose evidence was so acted on was a crucial one, and I cannot think that a decision can be regarded as satisfactory where it is based on evidence given before another magistrate, particularly when there is nothing to prevent the witness from giving evidence on the further hearing.

However, in the case of *PP v Kulasingam*,[7] Hashim Yeop A Sani J (as he then was) seemed to favour the prevention of rehearing when he said at p 27:

> The purpose of this section is to prevent a rehearing in certain cases where a rehearing will result in unnecessary hardship or injustice or unreasonable expenditure ...

But his Lordship also made such an approach 'subject always to the guarantee as provided in proviso (a) that the accused may demand any witnesses to be resummoned or reheard.'

Conclusion

For the foregoing reasons and summarized as:

(a) the defence is opposing the continuation of the hearing before another judge;
(b) the witnesses are available except for one who has since died;
(c) the prosecution is only concerned with the delay and the expenses in wanting to continue the hearing of this case from the defence stage;
(d) that neither the prosecution nor the defence can say that the order of the Supreme Court expressly or by implication allows the continuation of the hearing before another judge;
(e) that there is no statutory provision empowering a judge of the High Court to take over a part-heard criminal trial;

(f) that although the material witnesses can be recalled, in my view the result of recalling them will tantamount to rehearing the case afresh and that without recalling them I do not think I will be in the position to assess the credibility and value of their evidence; and

(g) that the charge preferred against the accused is a very serious one resulting in mandatory death sentence on conviction.

I am therefore of the view that in the interest of justice I should hear afresh this present case. Accordingly, an order of trial de novo is hereby issued.

Order accordingly.

Reported by Teh Y-Lyn